

IN THE UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF NORTH CAROLINA

MICHAEL MITCHELL,)	
)	
Plaintiff,)	
)	
v.)	1:13CV688
)	
NORTH CAROLINA DEPT. OF)	
PRISONS,)	
)	
Defendant(s).)	

ORDER AND RECOMMENDATION
OF UNITED STATES MAGISTRATE JUDGE

Plaintiff, a prisoner of the State of North Carolina, previously submitted a civil rights action pursuant to 42 U.S.C. § 1983 (Case 1:13CV82) based on claims that he needed, but was not being provided, certain dental care. The undersigned recommended that the Complaint in that case be dismissed because Plaintiff did not name proper defendants and because he appeared not to state a viable claim for relief. Plaintiff did not object and a Judgment was entered dismissing the action. Subsequently, Plaintiff submitted a Motion seeking leave to amend the complaint to fix some of the problems in the case. He also continued to raise allegations regarding the lack of proper dental care and filed a Motion seeking counsel. Those filings were initially docketed in the closed case, but have now been treated as a new case, which is before the Court for screening.

As a new case, the filings would fail because they are not on the proper forms and no new *in forma pauperis* application was submitted. However, the Court need not consider these defects because of subsequent events. During the time between the entry of the Judgment in 1:13CV82 and the present, Plaintiff filed a new action regarding the dental care he was receiving (Case 1:13CV241). The undersigned recommended that Plaintiff's second filing be dismissed with prejudice because, as Plaintiff had been warned in the Recommendation that his initial filing be dismissed, the facts he alleged failed to state a viable claim for relief. Again, Plaintiff did not object and a Judgment was entered dismissing his second case with prejudice under 28 U.S.C. § 1915A for failure to state a claim upon which relief could be granted.

Given the fact that Plaintiff raised his allegations regarding dental care in a separate action and was unable to state a claim, the present Complaint should be dismissed with prejudice because Plaintiff cannot bring those claims again. However, because it was filed at a time when Plaintiff was attempting to remedy the deficiencies in his initial filing and when his second filing had not yet been dismissed for failing to state a claim, the current dismissal should not be pursuant to § 1915A and should not count as a dismissal of the type described in 28 U.S.C. § 1915(g). Also, given this recommendation of dismissal and the events described above, Plaintiff's Motion for Appointment of Counsel (Docket Entry 2) will be denied.

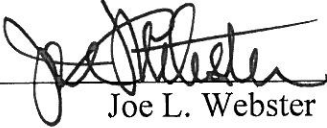
In forma pauperis status is granted for the sole purpose of entering this Order and Recommendation.

IT IS THEREFORE ORDERED that *in forma pauperis* status is granted for the sole purpose of entering this Order and Recommendation.

IT IS FURTHER ORDERED that Plaintiff's Motion for Appointment of Counsel (Docket Entry 2) is DENIED.

IT IS RECOMMENDED that this action be filed, but dismissed for the reasons set out above.

This, the 27th day of August, 2013.



Joe L. Webster
United States Magistrate Judge